

1 **DUMOND LAW, PLLC**
1006 W Adams Street, Suite 101
2 Phoenix, AZ 85007
Phone: (602) 803-4975
3 Fax (602) 680-3330
Samantha K. DuMond
4 **PCC 90015 - SBN 031072**
Samantha@DuMondLawAZ.com
5 Attorney for *Arizona Bail Bondsmen Association*

6 **IN THE SUPREME COURT**
7 **STATE OF ARIZONA**

8
9 **IN RE: PETITION TO AMEND THE**
10 **ARIZONA RULES OF CRIMINAL**
11 **PROCEDURE**

R-17-0002

ARIZONA BAIL BONDSMEN
ASSOCIATION'S RESPONSE TO PETITION
TO AMEND THE RULES OF CRIMINAL
PROCEDURE

12
13
14 The Arizona Bail Bondsmen Association, through undersigned counsel, hereby responds to
15 the Petition to Amend the Rules of Criminal Procedure and asks this Court to modify the proposed
16 changed as discussed below.

17
18 **Rule 7.1**

19 The definition of an appearance bond should be modified to read as follows:

20 **Appearance Bond.** An "appearance bond" is a written promise by a defendant or by a third
21 party to pay to the clerk a specified sum of money if the defendant fails to appear at a court
22 proceeding ~~or to comply with the conditions of release~~. An appearance bond can be secured or
unsecured. A secured appearance bond is secured by a deposit with the clerk of security equal to
the full amount of the bond.

23 There may be confusion in the definition as the term being defined "appearance bond" already
24 indicates a definition related to appearance. Including conditions of release will confuse Defendants
25 and the general public about what type of promise to pay they are making to the Court. Switching to
26

1 a performance based bond definition as the definition of an appearance bond is confusing in and of
2 itself. The phrase “or to comply with the conditions of release” can be removed. The Court is still
3 free to revoke the Defendant’s release conditions for violating a condition of release but the
4 Defendant or third-party would not be liable to pay the sum of money promised if that was to occur.

5 The definition of Security under 7.1(a) should be modified to read as follows:

6 **Security.** “Security” is cash, a surety’s undertaking, or any real property of value, deposited with
7 the clerk to secure an appearance bond. The value of that property is determined by the clerk or,
8 at the clerk’s or a party’s request, by a magistrate.

9 The addition of the word “real” in relation to property will prevent the Court from becoming a
10 pawn shop. Arizona’s bail system is collateral based and required for any bail bond. Allowing
11 individuals to post any type of property with the Court is a good idea in theory but the application
12 will have many pitfalls. First, what criteria will be established to determine the value of the items
13 used as security? Second, will the Court hold the property pledged for Security and if so, how will
14 that be done? Third, if the Court does not hold the property pledged, then how will the Court be able
15 to force compliance and collection of the property? Allowing real property to be pledged as security
16 has always been an option with the Court. Real property is not moveable, a lien can easily be
17 recorded, and a procedure has already been established for collection through foreclosure.

18 The definition of the word Surety should also be amended as follows:

19 **Surety.** A “surety” is a person or company, other than the defendant, who executes an appearance
20 bond and agrees to pay the amount of the bond if the defendant fails ~~to comply with its conditions~~
21 to appear for any court proceedings. A surety must file an affidavit with an appearance bond
22 stating that the surety is not an attorney or person authorized to take bail, and that the surety owns
23 property in Arizona (or is an Arizona resident owning property) with a value equal to or more
24 than the amount of the appearance bond. The property’s value is calculated after deducting the
25 amount exempt from execution and all liabilities, including the amount of any other outstanding
appearance bonds that the surety has entered into involving the same property.

1 A Bail Bond Company can also be the surety for a Defendant. This addition should be made to
2 ensure that a bail bond company can continue to post bonds for the Defendants and also to guarantee
3 them the protection of a Surety in specific provisions later on in the Rules. Furthermore, please refer
4 to the same argument under Appearance Bond for the rationale of the request to remove “to comply
5 with its conditions” and replace with “to appear for any court proceedings.”

6 The definition of Professional Bondsman should also be modified as follows:

7 **Professional Bondsman.** Any person who is a surety simultaneously on more than 4 appearance
8 bonds is a “professional bondsman.” A person may not be a professional bondsman unless the
9 person annually certifies in writing under oath to the superior court clerk that the person:

10 **(1)** is an Arizona resident;

11 **(2)** is licensed with the State of Arizona

12 **(3)** has sufficient financial net worth to satisfy reasonable obligations as a surety;

13 **(4)** agrees to assume an affirmative duty to the court to remain in regular contact with any
14 defendant released under an appearance bond on which the person is a surety;

15 **(5)** has not been convicted of a felony, except as otherwise provided in A.R.S. § 20-340.03;

16 **(6)** has no outstanding judgments arising out of surety undertakings; and

17 **(7)** has not, within a period of two years, violated any provisions of these rules or any court
18 order.

19 The clerk or the court may revoke or withhold a professional bondsman’s capacity to act as surety
20 if the bondsman violates this rule’s provisions.

21 Arizona Professional Bail Bondsmen are required to be licensed with the State of Arizona
22 Department of Insurance. This addition is to ensure that bondsmen are being licensed before being
23 allowed to post multiple bonds, are receiving the required training through the Department of
24 Insurance, and have passed mandatory testing and background checks. This addition will help to
25 ensure the safety of the community.

Rule 7.2

Rule 7.2(a)(1)(a) should be modified to read as follows:

After Conviction.

(1) *Superior Court.*

(A) *Generally.* After a person is convicted of an offense for which the person will, in all reasonable probability, receive a sentence of imprisonment, the court ~~may~~ must not release the person on bail or on the person's own recognizance unless:

(i) the court finds that reasonable grounds exist to believe that the conviction may be set aside on a motion for new trial, reversed on appeal, or vacated in a post-conviction proceeding; or

(ii) ~~the~~ all interested parties stipulate otherwise and the court approves the stipulation.

Comment to 7.2(a)(1)(a)(ii) – For purposes of this section, all interested parties must include the Surety.

The purpose of this provision is to allow the Defendant to remain out of custody if all parties agree. While the concept is a good idea, some of the interested parties may not have a say under the current version. The Surety should be able to agree or disagree with the decision to remain out of custody as the risk for failing to appear increases. Furthermore, a lot of the bonding contracts the bail companies have with the Defendant are pre-conviction contract. The bail bond itself specifies it is only pre-conviction and would require a substantial change in procedures for the bail industry if all of their bonds had to be amended to conform with an after conviction type bail under this scenario. Allowing the surety, whether a bonding company or simply a third-party cash poster to have a say under this rule provision would be more appropriate.

Rule 7.6

Rule 7.6 should be modified to read as follows:

Rule 7.6. Transfer and Disposition of Bond

(a) Transfer upon Supervening Indictment. An appearance bond or release order issued following the filing of a felony complaint in justice court will automatically be transferred to a criminal case in superior court after an indictment is filed that alleges the same charges.

(b) Filing and Custody of Appearance Bonds and Security. A defendant must file an appearance bond and security, if ordered, with the clerk of the court in which a case is pending or the court in which the initial appearance is held. If the case is transferred to another court, the transferring court also must transfer any appearance bond and security.

(c) Forfeiture Procedure.

(1) Arrest Warrant and Notice to Surety. If the court is informed that the defendant has violated a condition of an appearance bond, it may issue a warrant for the person's arrest. No later than 10 days after the warrant's issuance, the court must notify the surety, in writing or electronically, that the warrant was issued.

(2) Hearing and Notice. After issuing the arrest warrant, for the Defendant's failure to appear, the court must set ~~a~~ the first hearing within a reasonable time, no sooner than 60 days and no later than 120 days after it issued the warrant, requiring the parties and any surety to show cause why the bond should not be forfeited for the Defendant's Failure to Appear. The court must notify the parties and any surety of the hearing in writing or electronically. The forfeiture hearing may be combined with a Rule 7.5(d) hearing.

(3) Forfeiture. If the court finds that the violation is not excused, it may enter an order forfeiting all or part of the bond amount, and the State may enforce that order as a civil judgment. The order must comply with Arizona Rule of Civil Procedure 58(a).

For ease of reference a clean version of the proposed Rule 7.6(d) is submitted as follows:

(d) Exoneration.

(1) Generally. If the court finds before a violation that there is no further need for an appearance bond, it must exonerate the bond and order the return of any security.

(2) If the Defendant Is Surrendered, In-Custody, or Transferred. The court must exonerate the bond if:

(A) the surety surrenders the defendant to the sheriff of the county in which the prosecution is pending, and:

(i) the surrender is on or before the day and time the defendant is ordered to appear in court; and

- 1 (ii) the sheriff informs the court of the defendant's surrender;
- 2 **(B)** the defendant is in the custody of the sheriff of the county in which the prosecution is
3 pending on or before the day and time the defendant is ordered to appear in court under
4 the following conditions:
- 5 (i) the surety provides the sheriff with an affidavit of surrender of the appearance bond;
6 and
- 7 (ii) the sheriff reports the defendant is in custody and that the surety has provided an
8 affidavit of surrender of the appearance bond; or
- 9 **(C)** the defendant is in the custody or any jurisdiction on or before the day and time the
10 defendant is ordered to appear, and:
- 11 (i) the surety provides the sheriff of the prosecuting county an affidavit of surrender of
12 the appearance bond; and
- 13 (ii) the sheriff reports the defendant is in custody and that the surety has provided an
14 affidavit of surrender of the appearance bond; or
- 15 **(D)** before the defendant was released to the custody of the surety, the defendant was released
16 or transferred to the custody of another government agency, preventing the defendant
17 from appearing in court on the scheduled court date and the surety establishes:
- 18 (i) the surety did not know and could not have reasonably known of the release or
19 transfer or that a release or transfer was likely to occur; and
- 20 (ii) the defendant's failure to appear was a direct result of the release or transfer; or
- 21 **(E)** the Defendant was returned to the custody of the prosecuting county within 180 days of
22 the Defendant's Failure to Appear by any surety, government agency, or by self-
23 surrender.
- 24 **(3) *Conditions When Not Required to Exonerate Bond.*** The court is not required to exonerate
25 the bond under subsection (d)(2)(D) if a detainer was placed on the defendant before the
- - bond was posted or the release or transfer to another government agency was for 24 hours or
- - less.
- 26 **(4) *Other Circumstances.*** In all other instances, the court may exonerate a bond if appropriate.
- 27 **(5) *Post-Forfeiture Notice.*** After filing an order of forfeiture, the court must provide:
- 28 **(A)** a copy of the order to the State, the defendant, the defendant's attorney, and the surety;
29 and
- 30 **(B)** a copy of a signed order to the county attorney for collection.

1 The rationale behind the revisions to 7.6(d) is to provide more structure and continuity
2 throughout the State regarding bond forfeiture proceedings. There are a lot of procedural differences
3 from county to county in the State of Arizona on this Rule. First, changing the time period from “a
4 reasonable time” to no sooner than 60 days but no more than 120 days would give the Court an
5 appropriate window of time to set the first hearing. Changing the rule to indicate “the first hearing”
6 would also let the Courts know that there may be a continuance request. The proposed language or a
7 Comment to this portion would reflect that the Surety may request a continuance of this date if they
8 are still searching to locate the Defendant which is a common practice in the majority of the counties
9 but would be helpful in the counties that believe the hearing should not be continued.
10

11 Second, inserted Paragraph C allows for exoneration, prior to a Failure to Appear, when the
12 Defendant is incarcerated in another county, other than the prosecuting county. This provision would
13 cover the case where the Defendant has two open cases in two counties and can only be incarcerated
14 in one at a time. That example would leave one county to exonerate but the other may forfeit under
15 the proposed rules. This provision allows the Surety to provide the Defendant’s whereabouts and
16 incarceration status to all prosecuting counties, request their bond be exonerated, and the warrant be
17 reissued. The State would be able to immediately respond and know the exact whereabouts of the
18 Defendant prior to the Failure to Appear violation.
19

20 Third, the additional of paragraph E allows for mandatory exoneration if the Defendant is
21 returned to custody within a short period of time. The paragraph is identical to a variety of other
22 States including California. Adding this provision would give more structure in terms of bond
23 forfeitures after a Defendant’s failure to appear. The counties differ on how bail proceedings after
24 failure to appears are to be handled since they are discretionary at the moment and would remain
25 discretionary under the current rule revision. Similarly to the changes made in the Rule regarding the
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1 return of the Defendant to custody prior to Failure to Appear Violation, the same change needs to be
2 made to the rule which applies after the Defendant's failure to appear. Sureties have always been
3 able to seek exoneration under the discretionary provision and through case law by presenting
4 mitigation that the Surety returned the Defendant to custody. With the addition of Pre-Trial services
5 and ankle monitors, the Surety is not always able to be the one to return the Defendant to custody
6 based on the State's ability to instantly know about the failure to appear violation and the instant
7 locating of the Defendant through a GPS ankle monitor. Allowing the return to be by any
8 government agency would allow for exoneration in that exact scenario.
9

10 **Conclusion**

11
12 The Arizona Bail Bondsmen Association is very pleased to see bail reform and would like to actively
13 participate and assist with these Rule revisions to propose rules that cover various scenarios. The
14 proposed rule changes in the Petition are certainly in the right direction. The Association requests
15 this Court to consider the proposed changes mentioned above and believes with these revisions there
16 will be a substantial positive change in the bail bond industry.
17

18
19 RESPECTFULLY SUBMITTED this 14th day of March, 2017.

20 DUMOND LAW, PLLC

21
22 By: /s/ Samantha K DuMond
23 Samantha K DuMond
24 *Attorney for the Arizona Bail Bondsmen*
25 *Association*